Supreme Court, U.S.
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No. 94

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, DR. JOHN HAGELIN, JESSIE NICHOLS, PATRICIA ROBINSON, WANDA FERN KELLY,

Petitioners,

v.

BILL GRAVES, in his official capacity as Secretary of State of Kansas,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in light of the undisputed facts, Section 25-305(b) of the Kansas election laws (requiring independent nomination petitions for the office of President be filed no later than the Monday preceding the first Tuesday of August preceding a general election, or 91 days before the 1992 general election) violates the First and Fourteenth Amendments of the U.S. Constitution when the same Kansas election interests were accommodated in 1992 with a primary filing deadline of 41 days before the primary election.

2. Whether, in light of the undisputed facts, the 91 day deadline in advance of the general election for filing petitions unfairly discriminates against independent presidential candidates when Section 25-301 of the Kansas election laws allows the Republican and Democratic parties to place their presidential candidates on the ballot at any time after their nominating conventions, whenever such conventions are held, and when the Republicans, in 1992, did not nominate their presidential candidate until approximately two weeks after the independent filing deadline, and where the Democratic convention for President in 1996 is now scheduled for approximately two to three weeks after the independent filing deadline.

3. Whether the Tenth Circuit Court of Appeals misapplied the standard set forth by this Court in Anderson v. Celebreeze, 460 U.S. 780 (1983).

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REFERENCES

The decision of the U.S. District Court for the District of Kansas is reported at 804 F. Supp. 1377 (D.C. Kan. 1993). The decision of the United States Court of Appeals for the Tenth Circuit is reported at 25 F.3d 956 (10th Cir. 1994).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered an opinion and judgment in the case on June 7, 1994. Motions to Extend Time to file this Petition for Writ of Certiorari were granted by this Court with a filing deadline to file the Petition for the Writ of Certiorari of November 4, 1994. This Petition for Writ of Certiorari is taken from the June 7, 1994 Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The citations to the Constitutional provisions and federal and state statutes applicable to the case are: First Amendment to U.S. Constitution; Fourteenth Amendment to U.S. Constitution; 42 U.S.C. § 1983; 28 U.S.C. § 1254(1); K.S.A. § 25-202(a) and (b); K.S.A. § 25-203; K.S.A. § 25-205(a); K.S.A. § 25-208(a) and (b); K.S.A. § 25-301; K.S.A. § 25-302; K.S.A. § 25-303(a) and (b); K.S.A. § 25-305; K.S.A. § 25-308(d); K.S.A. § 25-604(c); K.S.A. § 25-1120; K.S.A. § 25-4501; K.S.A. § 25-4502(b); D. Kan. Rule 206(c). The text appears in the appendix.

STATEMENT OF THE CASE

This case involves the most basic of all constitutional liberties -- the right of citizens to vote for the candidates of their choice. Petitioners are Dr. John Hagelin, who was a candidate for President of the United States in the 1992 general elections; the Dr. John Hagelin for President Committee of Kansas, a political committee formed to promote the election of Dr. John Hagelin; Jessie Nichols, a candidate for U.S. Senator for the State of Kansas; Patricia Robinson, a candidate for U.S. Representative for the third congressional district of Kansas; and Wanda Fern Kelly, a Kansas voter who desired to have the names of the aforementioned candidates on the Kansas general election ballot.

This case began in the United States District Court in the District of Kansas, when petitioners sought declaratory and preliminary and permanent injunctive relief from the requirements of the Kansas election laws requiring independent candidates for federal office to obtain nomination petitions signed by not less than 5,000 qualified Kansas voters, and to file the petitions with the Secretary of State of Kansas no later than 12:00 noon on the Monday preceding the first Tuesday of August preceding a general election (i.e., no later than August 3, 1992). Petitioners contend these requirements abridge their First and Fourteenth Amendment speech, voting and associational rights and unconstitutionally discriminate against them on the basis of their political briefs and affiliations.

The facts in this case are undisputed as the Respondent failed to controvert Petitioners' Statement of Facts submitted to the District Court, and the District Court deemed the Petitioners' facts admitted under the local rules.

The basic facts are that on August 3, 1992, the deadline for independent canddiates to file their petitions, supporters of the candidacies of Hagelin, Nichols, and Robinson submitted petitions for each containing less than 5,000 signatures. On August 14, 1992, additional petitions which, when coupled with the earlier petitions, would have resulted in more than 5,000 signatures, were tendered by Petitioners but were rejected by the Secretary of State. While independents had an August 3rd deadline, Kansas has no deadline for major party presidential candidates to get on the general election ballot. The only requirement of Kansas law for the Republican and Democratic parties in order to have their candidates for President of the United States listed on the general election ballot is to submit the names of their candidates following their designation, whenever their nominations shall occur under K.S.A. § 25-301.

In addition, while there is a 91-day deadline for independent candidates to submit signatures prior to the general election (K.S.A. § 25-305(b)), under the Kansas election laws applicable to major party primary elections, in order for the names of primary candidates to be printed on primary election ballots, such candidates must file their nomination petitions by June 10 prior to a primary election, a deadline only 55 days before the primary election (K.S.A. § 25-205(a)). Moreover, in 1992, the June 10 deadline was enlarged by two weeks for candidates affected by redistricting, effectively allowing such primary candidates to file their nomination petitions by approximately June 24, 1992 (41 days prior to the primary election).

Because they did not controvert the Petitioners' facts, the Respondents were deemed to admit that the same state interests in voter education, administrative processing, political stability, avoidance of voter confusion, and prevention of fraud apply to both primary and general elections in Kansas.

Petitioners' undisputed facts set forth that the task of choosing among competing candidates is typically more difficult in primary elections than it is in general elections; that general elections do not require more advance time for voter education and decision-making than primary elections; and that the goal of voter education is served by regulations that permit an array of parties with their distinct viewpoints to air their views in competition with those expressed by representatives of the two major political parties.

Jurisdiction in the District Court was founded on the existence of a federal question arising under the First and Fourteenth Amendments to the U.S. Constitution and under 28 U.S.C. §1331 (district courts have original jurisdiction over legal actions under the Constitution and laws of the United States), 28 U.S.C. § 1343 (district courts have original jurisdiction to address a depravation of rights under color of state law or any right or privilege under the U.S. Constitution), 28 U.S.C. § 2201 (providing in a case within its jurisdiction, the district court may declare the rights and other legal relations of any interest party), and 42 U.S.C. § 1993 (authorizing a civil action for deprivation of rights under color of any statute).

ARGUMENT

1. The Tenth Circuit Court of Appeals has decided the federal question by applying a standard in conflict with the decision of the Eighth Circuit Court of Appeals, and in a way that conflicts with applicable decisions of this Court.

Kansas has an open-ended deadline for the Republican and Democratic parties to have their presidential candidates listed on the general election ballot. The names of the

Republican and Democratic presidential candidates can be submitted following their nominations, whenever those nominations shall be held under K.S.A. § 25-301.

In 1992, the Republican convention nominated George Bush on August 19, 1992, and, in accordance with the Kansas election laws, his name was thereafter printed on the Kansas general ballot. John Hagelin and the other Petitioner candidates, despite tendering sufficient petitions on August 14, 1992 (eleven days after the August 3, 1992, deadline for independent candidates), were denied access to the Kansas general election ballot.

The standard applied by the Tenth Circuit was that set forth in Anderson v. Celebreeze, 460 U.S. 780 (1983). The Anderson Court described the trial court's task in evaluating a constitutional challenge to a state's ballot access laws, as follows:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebreeze, 460 U.S. 780 at 789 (1983). This test was affirmed by this Court in Burdick v. Takushi, 112 S.Ct.

2059, 2063 (1992).

The approach used by Anderson is described as a balancing test "that ranges from strict scrutiny to a rational-basis analyses depending on the circumstances." Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992). But neither Anderson nor Burdick nor any other Supreme Court case employing the Anderson test concerned an equal protection challenge to state election laws, as exists in this case. Anderson, Burdick, and Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), and Norman v. Reed, 112 S.Ct. 698 (1992) involved challenges or holdings based solely on the First Amendment. See the discussion in Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992).

While the Tenth Circuit applied the balancing test of Anderson to the facts of this case, if faced with the equal protection challenge presented here, the Eighth Circuit would apply a strict scrutiny test because of the dangers to the "vital individual rights" of Petitioners. Manifold v. Blunt, 863 F.2d 1368, 1372 (8th Cir. 1988). Under this test the restriction must be necessary to serve a compelling state interest, and may not go beyond what the state's interest actually requires.

Because of the vital rights involved, and the uniquely important national interest concerning a presidential election, this Court should decide the proper standard to be applied to an equal protection challenge. The Tenth Circuit pointed out that the Kansas filing deadline is in line with the deadlines of approximately two-thirds of the states (page 21A). That means that the Republican convention in 1992, and the planned Democratic convention in 1996 (scheduled for late August), will result in the major party designation of their presidential candidates at least several weeks after two-thirds of the states will have required the independent candidates to qualify for

access to the general election ballot. If there is an unconstitutional discrimination against the independent and third party candidates, it is, therefore, widespread and pervasive.

Moreover, even under an Anderson standard, the Tenth Circuit decided this case in a way that conflicts with Anderson in vital respects.

Anderson indicates that the reason the early March filing deadline in that case imposed a substantial burden on the constitutional rights of the candidates and voters was that it precluded the emergence of independent candidates who can serve as a focal point *after* the major party candidates are designated for those voters dissatisfied with the choices within the two major parties. Anderson at 460 U.S. 781, 791 (1983). The Tenth Circuit has also concluded that support for a new party or candidate is most likely to crystallize after the established political parties have put forth their candidates and platforms. Populist Party v. Herschler, 746 F.2d 656 (10th Cir. 1984); Blomquist v. Thomson, 739 F.2d 525 (10th Cir. 1984).

The open-ended deadline for the major parties in this case expresses a discriminatory willingness of the Kansas legislature to accommodate the major parties by allowing their candidates on the ballot whenever they make their decisions. While it is true, as the Court of Appeals states, that Kansas does not control the date of the major party conventions, that doesn't give them the right to discriminate in their favor. In Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992), this Court reiterated that state law may impose only, "reasonable, non-discriminatory restrictions" (emphasis applied) on the First and Fourteenth Amendment rights of voters, citing Anderson. See Libertarian Party of Kentucky v. Ehrler, 776 F.Supp. 1200 (E.D.Ky. 1991) holding that a deadline imposed on independents or minor party candidates and not on the major party candidates is

unconstitutional.

The Tenth Circuit reasoned that major party nominees had to file a declaration of intent or qualifying petition by February 12 to run in the State presidential preference primary under K.S.A. § 25-4502(b), then survive a primary and national convention for their names to appear on the ballot. But the preference primary is not binding on state delegates and the Tenth Circuit's argument assumes the candidate who files on February 12 actually becomes the major party's chosen candidate at the convention. In reality, it is the votes at the convention that determine who will be the major party candidate, irrespective of whether the particular candidate has made the February 12 filing and won a primary race or been scrutinized by the public. K.S.A. § 25-301 simply states: "[Major] party nominations so made [by convention] shall, subject to the provisions of this act, be placed upon the official general ballot."

2. **The Tenth Circuit did not properly assess the important First Amendment voting and associational rights involved in this case, again deciding the federal question in a way that conflicts with prior decisions of this Court.**

In evaluating the character and magnitude of the injury to the Petitioners' rights in accordance with Anderson, the Tenth Circuit Court of Appeals agreed with the District Court that the filing deadline imposed by Kansas was a burden on the associational rights of independent candidates and voters, but found that the burden was "not substantial," in light of the other modest requirements of Kansas law (presumably 5,000 signatures) for access to the ballot by independent candidates. This ignores the critical nature of the right to vote under the First Amendment, a right which only occurs every four years in

presidential elections, and is uniquely important to the national interest.

While it is true that the filing deadline in the instant case is not as early as in Anderson, there can hardly be said to be more important rights than the speech, voting and associational rights embodied in the First Amendment. In Williams v. Rhodes, 393 U.S. 23, 31 (1983) the Court stated that "only a compelling state interest ... can justify limiting First Amendment freedoms."

The Court of Appeals also concluded that the burden on Petitioners was not substantial because the Kansas filing deadline is in line with the deadlines of approximately two-thirds of the states, and simply fell a few weeks before one party's convention in one particular year. Comparing the Kansas deadline of 91 days before a general election to the deadlines of other states may have some relevance, but the various states may need different periods of time based on differing state interests. The proper analysis would examine the internal consistency or inconsistency in the statute itself, since that shows what are the real interests of the state of Kansas. For example, if Kansas, like Wyoming had a 45-day deadline in advance of a general election, and without any reason Kansas then changed the deadline to 91 days before the election, there would be no compelling state interest for the additional 46 days irrespective of what other states may have in the way of deadlines.

In this case we have a filing deadline that permitted the major party candidates to have 41 days prior to the primary election to file their petitions (when the same interests in voter education and administrative processing applied), as compared with a general election which requires the independents to submit their petitions 91 days before the general election.

In Libertarian Party of Kentucky v. Ehrler 776 F.Supp. 1200 (E.D. Ky. 1991), the court declared the state statute unconstitutional stating that:

> [T]he Defendants have offered no explanation for the different filing deadlines between statewide and presidential elections. In statewide elections, the filing deadline is 280 days before the general elections; in presidential elections, the filing deadline is 68 days before the general election.

Id. at 1205.

3. The State did not identify any compelling interest in its 91-day filing deadline in advance of general elections.

As Anderson states, the Court's task in evaluating a constitutional challenge is to compare the character of the Petitioner's rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." Anderson v. Celebreeze, 460 U.S. at 789 (1983). Because Kansas had a 41 day deadline for filing petitions in primary elections, and because the State admitted that voter education does not require more time in general elections than primary elections, the State should have had no compelling interest in a deadline longer than 41 days before the general election. The courts below engaged in speculation as to why Kansas might need more time in a general election and looked to the deadlines in other states. This raises the important question of whether a state may simply assert that it has a compelling interest, or must at least offer a rationale, if not some evidence, concerning its interest. In this case the State did neither. No interests were "put forward by the State" in any precise way to justify the limit on constitutional freedoms as required by Anderson v.

Celebreeze.

In the District Court the Respondent merely identified five separate interests that it sought to further by its deadline for independent candidates: voter education, avoidance of voter confusion, political stability, prevention of fraud, and administrative processing.

The District Court and the Court of Appeals concluded that only voter education provided a sufficient state interest, but both courts ignored the undisputed facts submitted to the District Court that voter education requires *less* time for a general election than a primary election. The Tenth Circuit noted that the State failed to offer any evidence "disputing plaintiffs' [Petitioners'] evidence that voter education could be accomplished within a shorter period of time" but erroneously felt that was not dispositive.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, DR. JOHN HAGELIN, JESSIE NICHOLS, PATRICIA ROBINSON, WANDA FERN KELLY,	)	
Plaintiffs - Appellants,	)	
v.	)	No. 93-3314 (D.C. No. 94-4201-RDR)
BILL GRAVES, in his official capacity as Secretary of State of Kansas,	)	
Defendant - Appellee.	)	

JUDGMENT
Entered June 7, 1994

Before BALDOCK and McKAY, Circuit Judges, and BROWN*, District Judge.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, DR. JOHN HAGELIN, JESSIE NICHOLS, PATRICIA ROBINSON, WANDA FERN KELLY,	)	
Plaintiffs - Appellants,	)	
v.	)	No. 93-3314 (D.C. No. 94-4201-RDR)
BILL GRAVES, in his official capacity as Secretary of State of Kansas,	)	
Defendant - Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 92-4201-RDR)

Submitted on the briefs:

Jay B. Marcus, Fairfield, Iowa, for Plaintiffs-Appellants.

Robert T. Stephan, Attorney General, David C. Wetzler, Assistant Attorney General, Topeka, Kansas, for Defendant-Appellee.

Before BALDOCK and MCKAY, Circuit Judges, and BROWN,** District Judge.

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

MCKAY, Circuit Judge.

Plaintiffs Dr. John Hagelin for President Committee of Kansas, Dr. John Hagelin, Jessie Nichols, Patricia Robinson, and Wanda Fern Kelly appeal from a summary judgment in favor of defendant Bill Graves, the Secretary of State of Kansas.1/ Plaintiffs Hagelin, Nichols, and Robinson were candidates for national office with the Natural Law Party in 1992, Hagelin for president, Nichols for U.S. senator, Robinson for U.S. representative. Plaintiff Kelly is a registered voter in Kansas who wished to vote for the candidates in the November 1992 general election. Each of the candidates missed the deadline set forth in Kan. Stat. Ann. Sec. 25-305(b) for independent candidates to file nomination petitions. This section requires the filing of nomination petitions by the Monday preceding the primary election, which turns out to be about ninety-one days before the general election.

Plaintiffs argue that Kansas's ballot access laws unfairly discriminate against independent candidates by requiring them to submit their nomination petitions ninety-one days before the general election, while the Republican and Democratic parties can place their presidential candidates on the ballot at any time after such candidates are designated. They also contend that the

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1/ Both parties have waived oral argument. The case is therefore ordered submitted without oral argument.

state's interests do not justify the burdens imposed by its laws. We affirm the decision of the district court.

Kansas provides several methods for candidates to have their names placed on the ballot. Candidates who are members of parties whose candidate for governor polled at least 5% of the total vote cast for all candidates for governor in the preceding general election shall be nominated by primary election. Kan. Stat. Ann Sec. 25-202(a), (b). Candidates who wish to run in the primary, which is held the first Tuesday in August of even-numbered years, Kan. Stat. Ann. Sec. 25-203(a), are required to file nominating petitions or a declaration of intent to become a candidate by June 10. Kan. Stat. Ann. Sec. 25-205(a). Party nominations made by primary election shall be placed on the general ballot, Kan. Stat. Ann. Sec. 25-301, but no deadline is set forth for submitting these nominations. However, because absentee ballots must be prepared at least twenty days before the election, Kan. Stat. Ann. Sec. 25-1120, arguably parties must submit the names of their nominees before this deadline.

Candidates of parties whose candidate for governor did not poll at least 5% of the total vote cast for all candidates for governor in the last general election may not use the primary nomination process. Kan. Stat. Ann. Sec. 25-202(b). Recognized parties that are not authorized to participate in the primary may nominate candidates by means of a delegate or mass convention or caucus of qualified voters. Kan. Stat. Ann. Sec. 25-302. Certificates of nominations by convention or caucus shall be filed by June 10. Kan. Stat. Ann. Sec. 25-305(a).

A party may seek the official recognition by filing a petition sixty days before the deadline for filing nomination papers and declarations of candidacies, Kan. Stat. Ann. Sec. 25-

302a, which is approximately April 10. These parties apparently may then nominate candidates pursuant to Sec. 25-302.

Finally, all nominations other than party nominations shall be independent nominations. Kan. Stat. Ann. Sec. 25-303(b). Such nominations may be made by filing petitions signed by at least 5,000 qualified voters, id., by the Monday before the primary election, Kan. Stat. Ann. Sec. 25-305(b).

Major party candidates wishing to run in the Kansas presidential preference primary election, which is held the first Tuesday in April every four years, Kan. Stat. Ann. Sec. 25-4501, must file a declaration of intent or petition by the previous February 12, Kan. Stat. Ann. Sec. 25-4502(b). Party nominations for presidential electors are made by a delegate or mass convention or caucus of qualified electors. Kan. Stat. Ann. Sec. 25-301. No time limit is set for such a convention. The Kansas statutory scheme apparently permits presidential candidates, but no others, to have their names placed on the general election ballot if nominated by their party, even if they did not run in the primary.

Candidates who are unable to have their names placed on the ballot through these means still may participate in the election process as write-in candidates. Such candidates must file an affidavit of write-in candidacy by the second Monday before the general election. Kan. Stat. Ann. Sec. 25-305(c)-(e).

The Natural Law Party was formed April 20, 1992, which was too late for recognized party status under Sec. 25-302a that year. It began its effort to obtain the necessary nominating petitions for candidates in late June 1992. On August 3, 1992, the section 25-305(b) filing deadline for independent candidates, the candidates submitted nomination petitions containing less than the required 5,000 signatures. As

a consequence, the Secretary of State rejected the petitions. In the next eight days, the candidates obtained enough additional signatures to meet the signature requirement. The Secretary of State rejected these petitions as untimely. The candidates' names did not appear on the ballot in the general election.

In 1992, the Democratic presidential candidate was nominated on or about July 16, 1992, and the Republican candidate on or about August 19, 1992. Consequently, in 1992, independent candidates were required to file nominating petitions before the Republican presidential nominee was known.

Plaintiffs commenced this 42 U.S.C. Sec. 1983 action, claiming that section 25-305(b) violated their rights under the First and Fourteenth Amendments to the United States Constitution. Each side moved for summary judgment. The district court held the state's interest in voter education was sufficient to justify the burden the filing deadline imposed on plaintiffs' rights, granted the state's motion and denied plaintiffs' motion.

We review a grant of summary judgment de novo, applying the same standard as the district court. Osgood v. State Farm Mut. Auto. Ins. Co, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment is appropriate if "there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the state failed to submit any materials contradicting plaintiffs' statement of facts in support of their motion for summary judgment, these facts are deemed admitted. Consequently, the sole issue is whether the state was entitled to a judgment as a matter of law.

While voting is of fundamental constitutional

significance, the rights to vote in any manner and to associate for political purposes through the ballot are not absolute. Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992). Rather, the states retain the power to regulate elections, and their election laws invariably will impose some burden on voters. Id.

The question here is whether the burden imposed is unconstitutional. In making this determination, we must weight

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)); see also Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 743 (10th Cir. 1988).

When a ballot access law severely restricts First and Fourteenth Amendment rights, it must be "'narrowly drawn to advance a state interest of compelling importance.'" Burdick, 112 S. Ct. at 2063 (quoting Norman v. Reed, 112 S. Ct. 598, 705 (1992)). But when the law imposes only "'reasonable, nondiscriminatory restrictions'" upon the constitutional rights of voters, "'the State's important regulatory interests are generally sufficient to justify'" the restrictions. Id. at 2063-64 (quoting Anderson, 460 U.S. at 788).

We begin our analysis by considering the character and magnitude of the alleged constitutional injury. Ballot access restrictions burden two different, though overlapping, rights: the right of individuals to associate to advance their political

beliefs, and the right of qualified voters to cast effective votes. Populist Party v. Herschler, 746 F. 2d 656, 659 (10th Cir. 1984). These rights "'rank among our most precious freedoms.'" Id. (quoting William v. Rhodes, 393 U.S. 23, 30 (1968)). A filing deadline that falls unequally on independent candidates "impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and--of particular importance--against those voters whose political preferences lie outside the existing political parties." Anderson, 460 U.S. at 793-94.

Anderson indicated that a March filing deadline for independent presidential candidates imposed a substantial burden on voting and associational rights in part because it precluded the emergence of independent candidates who could serve as a focal point for a group of voters who are dissatisfied with the choices within the two major parties. Id. at 791. We concluded in Blomquist v. Thomson, 739 F.2d 525, 528 (10th Cir. 1984), that a June 1 deadline for a new political party seeking ballot access directly burdens voting and associational rights because it "prevents a new party from seeking support at a time when such support is most likely to crystallize after the established political parties have put forth their candidates and platforms." (citing Anderson, 460 U.S. at 790-91). See also Rainbow Coalition, 844 F.2d at 744 (May 31 deadline); Populist Party, 746 F.2d at 661 (June 1 deadline).

However, in Rainbow Coalition, 844 F.2d at 745-46, we refused to give significant weight to undisputed evidence that minority parties have difficulty with petition drives until after the major parties' conventions, in light of the Supreme Court's approval of filing deadlines before the major party conventions in American Party v. White, 415 U.S. 767, 787 n. 18 (1974), and Jenness v. Fortson, 403 U.S. 431, 438 (1971).

We do not interpret our previous decision or Anderson as mandating a holding that a filing deadline for independent candidates which is in line with the deadlines of approximately two-thirds of the states, see Anderson, 460 U.S. at 795 n. 20, imposes a substantial burden on voting and associational rights merely because it fell a few weeks before one major party's convention one year. Cf. Perry v. Grant, 775 F. Supp. 821, 829 (M.D. Pa. 1991) (noting no constitutional entitlement to gather signatures for nominating papers after nomination of party candidates). There is no evidence in the record as to exactly when the major parties hold their conventions, although they traditionally occur during the summer months. See Anderson, 460 U.S. at 800. The deadlines in the previous Tenth Circuit cases and Anderson undoubtedly fell before the major parties would hold their conventions. For all we know, it was anomaly in the present case that independents had to file before a major party convention in 1992. In any event, Rainbow Coalition made it clear that a filing deadline, at least for nonpresidential candidates, does not impose an unconstitutional burden merely because it falls before the major party conventions

Nor can we say that section 25-305(b) deadline falls unequally on independent candidates to their detriment. Plaintiffs argue that section 25-301 is advantageous to major parties because it imposes no time limits on them to submit the names of their presidential nominees. They fail to consider that major party nominees have to file a declaration of intent or qualifying petition by February 12 to run in the presidential preference primary, then survive a primary and a national convention for their names to appear on the ballot. In contrast, a nonparty candidate need only obtain the necessary number of signatures and file a petition in early August for his or her name to appear on the ballot. While an independent candidate can have his or her name placed on the ballot without any public exposure, the same cannot be said for the major party candidates

who are subjected to intense public exposure during the party conventions and long before. It cannot be argued that major party candidates face a lighter burden in having their names placed on the ballot.

The section 25-305(b) deadline undoubtedly burdened the candidates' interest in having more time to seek independent ballot status. However, little weight is given to such an interest. See Burdick, 112 S. Ct. at 2065. We agree with the district court that any injury to plaintiffs' constitutional rights is minimal.

We next identify and evaluate the interest asserted in support of the filing deadline, keeping in mind that because the burden on plaintiffs' rights is slight, "the State need not establish a compelling interest to tip the constitutional scales in its direction." Id. at 2066. The state initially asserted five interests: voter education, prevention of fraud, avoidance of voter confusion, prevention of chaos in the party system, and administrative processing. The district court concluded the state had virtually admitted that only voter education could justify the filing deadline. While the state challenges this conclusion, the only interests it asserts on appeal are administrative processing and voter education. We therefore limit our consideration to those interests.

The state has not shown it needs ninety-one days for administrative processing. The Secretary of State and county election officers are required by statute to determine the validity of a nomination petition or declaration of intent within ten days after filing, excluding Saturdays, Sundays, and holidays--or within about fourteen days. Kan. Stat. Ann. Sec. 25-208(b). Such objection shall be considered within five days of the decisionmakers receiving notice of the objection. Kan. Stat. Ann. Sec. 25-308(d). The ballots must be submitted to the county election officers at least five days before the election.

Kan. Stat. Ann. Sec. 25-604(c). Absentee ballots must be prepared no later than twenty days before the general election. Kan. Stat. Ann. Sec. 25-1120.

In addition to these statutory limits, plaintiffs represent that two weeks are needed for typesetting and proofreading, four to five days are needed for printing, and a few weeks are needed for affixing the ballots to ballot machines where they are used. A lesser though unspecified amount of time is needed where ballot machines are not used. Appellants' App. at 24. We conclude that no more than a maximum of approximately seventy-five days are needed for processing ballots.2/

The remaining time, therefore, must be justified by the state's interest in voter education. Voter education is a legitimate state interest. Anderson, 460 U.S. at 796. Plaintiffs argue, however, that the filing deadline for independent candidates cannot be justified by the state's interest in voter education because the filing deadline for the primary is only fifty-five days in advance (forty-one days in 1992),3/ and because the state failed to challenge plaintiffs' assertions that 1) the primary voter must work harder to gain information about the primary than the general election; 2) there are more candidates on the primary ballot; and 3) voters in the general election are primarily interested only in candidates for top-of-the-ballot offices.

2/ While the state argues that it needs ninety-one days to perform the seventeen tasks that must be completed between the primary and general election, it has not identified any specific time limits in addition to those set forth above.

3/ The June 10 deadline was extended by two weeks for candidates affected by redistricting in 1992.

The state's failure to offer any evidence disputing plaintiffs' evidence that voter education could be accomplished within a shorter period of time is not dispositive. States need not demonstrate they have achieved their interests through the least restrictive means available, Rainbow Coalition, 844 F.2d at 743, nor are they required to make a particularized showing of a need for reasonable ballot access restrictions, Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986).

Viewing Kansas's election scheme in its entirety, as we must, see Libertarian Party v. Bond, 764 F.2d 538, 541 (8th Cir. 1985), we conclude it is a reasonable response to the state's interest in voter education. Major party candidates are required to file their nominating petitions approximately fifty-four days earlier than independent candidates, by June 10. Presidential candidates who run in the presidential preference primary must file their nominating papers almost six months in advance of independent candidates. Independent candidates, in contrast, are allowed a "grace period" for filing their nominating petitions until early August. It is reasonable to require major party candidates to file this far in advance of independent candidates because the major party candidates must first educate the public as to their viability as the party's candidate, then survive the primary, a process that "'functions to winnow out and finally reject all but the chosen candidates.'" Munro, 479 U.S. at 196 (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

It is reasonable for Kansas to require, in furtherance of its interest in educating the electorate, that independents make their candidacies official at approximately the same time the major party candidates are chosen, i.e., on or about the date of

the primary.4/ At that time the candidates can begin debating, contrasting themselves to other candidates, and submitting themselves to media scrutiny. This conclusion is not altered by the fact that in 1992, independent presidential candidates had to file approximately sixteen days before the Republicans nominated their presidential candidate. The State of Kansas does not control the dates of the major party conventions, and may not even know from year to year what those dates will be. As those conventions traditionally occur during the summer months, see Anderson, 460 U.S. at 800, it was not unreasonable for Kansas to choose a filing date for independent candidates that is around the time all of the candidates will be known.

We conclude the state's interest justify the slight burden section 25-305(b) imposes on plaintiffs' rights. Consequently, we AFFIRM the judgment of the United States District Court for the District of Kansas.

4/ Our analysis is not affected by the fact that independents must file one day before the primary.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, et al.,	)
Plaintiffs,	)
	) Case No. 92-4201- RDR
vs.	)
BILL GRAVES, Secretary of State of Kansas,	)
Defendant.	)

MEMORANDUM AND ORDER

Plaintiffs, who are members of the Natural Law Party, seek to enjoin the Secretary of State from enforcing K.S.A. 25-305, which requires that nomination petitions for independent candidates be filed ninety-one days prior to the general election.5/ The court has previously denied plaintiffs' motion

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[5] The statute challenged by the plaintiffs, K.S.A. 25-305(b), provides as follows:

> Independent nomination petitions for the nomination of candidates for national, state, county and township offices shall be filed with the secretary of state or the county election officer no later than 12:00 noon on the Monday preceding

for preliminary injunction. Hagelin v. Graves, 804 F.Supp. 1377 (D.Kan. 1992). This matter is presently before the court upon cross-motions for summary judgment.6/ The court has heard oral argument on these motions and is now prepared to rule.

I.

The Natural Law Party was formed on April 20, 1992. The goal of the party is to bring scientific solutions to the problems of the United States. Dr. John Hagelin was selected as the party's candidate for President of the United States. The party also approved the candidacies of Jessie Nichols for United States Senator for the State of Kansas and Patricia Robinson for United States Representative for the Third District of the State of Kansas. The three candidates met all of the requirements

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> the date fixed for holding of primary elections in accordance with K.S.A. 25-203, and amendments thereto, preceding a national, state, county or township general election.

The primary election in Kansas is held in even-numbered years on the first Tuesday in August. K.S.A. 25-203(a). The general election is held on the first Tuesday following the first Monday in November of each even-numbered year, which means that the general election usually follows the primary election by ninety days. K.S.A. 25-101.

[6] Neither side has raised the issue of mootness even though the 1992 election has taken place since the court's ruling on the plaintiffs' motion for preliminary injunction. The court is convinced that mootness is not a problem since the issue raised by the plaintiffs is "capable of repetition, yet evading review." See Anderson v. Celebrezee, 460 U.S. 780, 784 n. 3 (1983); Storer v. Brown, 415 U.S. 724, 737 n. 8 (1974); Rosario v. Rockefeller, 410 U.S. 752 n. 5 (1973); Dunn v. Blumstein, 405 U.S. 300, 333 n. 2 (1972).

prescribed by law for the office each was seeking. Efforts were begun on June 28, 1992 to obtain the necessary signatures on nominating petitions for these candidates. Nomination petitions on behalf of the three candidates of the Natural Law Party were submitted to the office of the Secretary of State on August 3, 1992. The candidates were subsequently advised by the Secretary of State's office that the petitions did not contain a sufficient number of signatures, and that the filing of the petitions was determined to be invalid. Thereafter, supporters of the candidates continued to circulate nomination petitions in Kansas. On August 14, 1992, more nomination petitions were refused because the deadline for the submission of nomination petitions had already passed.

Independent candidates in Kansas have two avenues of getting their names printed on the ballot. First, if the candidate is a member of a party that has received "official recognition" by the State of Kansas, he may file his declaration of candidacy in June preceding the general election. See K.S.A. 25-302a, 25-305(a). This will allow the candidate to appear on the general election ballot in November. This avenue was closed to the plaintiffs here because the deadline for receiving official party recognition in Kansas was April 10, 1992, which was ten days prior to the time that the Natural Law Party was organized.

Second, an independent candidate who is not a member of a party with official status may obtain nomination petitions in order to be placed on the general election ballot. The number of signatures necessary to be placed on the ballot differs depending on the office sought. See K.S.A. 25-303. In this case, each plaintiff candidate was required to obtain the signatures of 5,000 qualified voters. K.S.A. 25-303(b) and (c). The deadline for the presentation of these signatures to the Kansas Secretary of State was noon on August 3, 1992, the Monday preceding the date of the scheduled primary election. The Secretary of State has ten

days, excluding Saturdays, Sundays and holidays, to determine the validity of the nomination petitions. K.S.A. 25-208a(a). If the Secretary of State declares a nomination petition invalid, the affected candidate has three days to file an objection. K.S.A. 25-308(b). The objection must then be considered within five days after notice of the objection is given to members of the panel that is responsible for deciding the objection, which consists of the lieutenant governor, secretary of state and attorney general. K.S.A. 25-308(c), (d).

In order for the Republican and Democratic candidates for President to be listed on the general election ballot, the parties need only submit the names of their candidates following their designation. See K.S.A. 25-301. The only apparent restriction is that the names of the candidates must be submitted no later than twenty days prior to the general election to allow for preparation of the absentee ballots. See K.S.A. 25-1120.

The election process in Kansas is administered locally by each of the 105 counties. K.S.A. 25-604. The time required for the production of ballots in each county varies according to the type of ballot used in that county. Some counties use voting machines while many continue to use paper ballots. As noted previously, absentee ballots are required to be prepared at least twenty days prior to the general election. K.S.A. 25-1120. The federal government has not established a federal absentee ballot deadline.7/

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7 In the court's order on the plaintiffs' motion for preliminary injunction, we indicated that the federal government, through the Department of Defense, had established a federal absentee deadline. This statement was based upon representations made by the defendant at the hearing on the plaintiffs' motion for preliminary injunction. The defendant at that time stated that the federal deadline for absentee ballots was forty-five days. This representation was subsequently

Following this court's order on the plaintiffs' motion for preliminary injunction, the parties entered into a number of stipulated facts. The court shall discuss these facts as we consider the arguments of the parties. In their motion for summary judgment, plaintiffs set forth a number of "undisputed" facts. The defendant has failed to controvert these facts. Accordingly, they are deemed admitted by the defendant. See D.Kan.Rule 206(c). Many of these facts are derived from affidavits of plaintiffs' expert witnesses; Dr. Lee Sigelman, a professor in political science and a scholar in the area of politics and elections; and Richard Winger, the publisher of a newsletter entitled Ballot Access News.

II.

The law is well-settled that a state has the power to engage in "substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic processes." Storer, 415 U.S. at 730. The state's right to regulate the electoral process is supported by two constitutional bases as well as by "common sense." Burdick v. Takushi, ____ U.S. ___, slip op. at 4 (1992). Article I of the Constitution grants to the states the power to regulate the time, place, and manner of holding elections for the United States Senators and

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discovered to be in error. The defendant has now stipulated that there is no federal legislation or binding regulation requiring Kansas to transmit absentee ballots to Kansas voters at any particular time. However, in a Voting Assistance Guide, the federal government has advised voters that most states begin mailing ballots to voters thirty to forty-five days before an election. The government further advises that voters should apply for a ballot at least thirty days prior to an election. Kansas attempts to make absentee ballots available to overseas voters in a timely fashion in accordance with the federal eligibility standards for a federal absentee ballot. The same standards apply to both primary and general elections.

Representatives. U.S.Const. art I, § 4, cl. 1. Article II vests the states with authority to appoint the presidential electors from each state by any method which the state legislature choose. Id. art. II, § 1, cl. 2.

The broad powers to prescribe the time, place and manner of elections, however, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986). The rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the First and Fourteenth amendments, and the state may not burden these rights excessively. See Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

In our prior opinion in this case, the court applied the standard adopted in Anderson, and we shall continue to do so in this opinion. However, we want to briefly comment on the state of the law in the ballot access area. In ballot access cases, prior to Anderson, the Supreme Court generally applied equal protection strict scrutiny. See, e.g., Williams, 393 U.S. at 30-32; Bullock v. Carter, 405 U.S. 134, 142-44 (1972). However, in Anderson, the Supreme Court chose to rely directly on the First and Fourteenth Amendments rather than on equal protection grounds. 460 U.S. at 786 n. 7. Nevertheless, the Court found it helpful to rely on prior cases using the Equal Protection Clause analysis. Id. The Anderson court developed the following analytical framework:

> [The court] must first consider the character and magnitude of the asserted inquiry to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must

> identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789.8/ See also Thournir v. Meyer, 909 F.2d 408,409 (10th cir. 1990).

The approach adopted by the Court in Anderson has been characterized by one court as a "balancing test that ranges from strict scrutiny to a rational-basis analysis, depending on the circumstances." Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992). The Tenth Circuit, however, has rejected the contention that a court should employ "strict scrutiny" review in a ballot access case. Rainbow Coalition v. Oklahoma State Election Board, 844 F.2d 740, 742-43 (10th Cir. 1988). Recently, in Burdick, the Court reiterated the standards set forth in Anderson and reaffirmed that "to subject every voting

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[8]The Supreme Court further explained the burden as follows:

> "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" Anderson, 460 U.S. at 792 (quoting Clements v. Fashing, 457 U.S. 957, 964 (1982)) (plurality opinion) (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).

regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Slip op. at 5.

In applying these standards, we recognize that there is no "litmus-paper test" for evaluating constitutional challenges to election laws. Storer, 415 U.S. at 730. In ruling on such challenges, "there is 'no substitute for the hard judgments that must be made.'" Anderson, 460 U.S. at 789-90 (quoting Storer, 415 U.S. at 730). Decisions in ballot access cases are "very much a 'matter of degree.'" Storer, 415 U.S. at 730 (quoting Dunn, 405 U.S. at 388).

III.

Plaintiffs' position is that the August 3rd filing deadline operates to require them to file petitions for the offices of President, United States Senator and United States Representative far in advance of the general election, and thereby imposes unreasonable burdens on the plaintiffs' rights of political association and freedom of speech. Plaintiffs argue that the early deadline precludes Kansas voters from voting for late emerging political candidates. They also argue that the deadline is not compelled by Kansas interests. In support of these positions, they note that the period between the filing deadline for the primary election and the primary election is only 55 days,9/ while the period between the filing deadline for the

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[9] Under the Kansas election laws applicable to primary elections, candidates other than presidential primary candidates of major parties are required to file their nomination petitions or declare their candidacies and pay a filing fee by June 10, which is fifty-five days prior to the primary election. K.S.A. 25-205(a). In 1992, the deadline was extended to June 24 due to redistricting. This resulted

general election and the general election is 91 days. Plaintiff Hagelin also contends that the current deadline particularly discriminates against him because it may occur prior to the presidential conventions of the major parties (and did, in fact, occur this year with regard to the Republican Convention), and the Kansas laws allow the candidates of the major parties to be placed on ballots after the deadline.

The defendant contends that the deadline established by Kansas law, 91 days prior to the general election, is constitutional. The defendant argues that the state interests of voter education, prevention of fraud, avoidance of voter confusion, prevention of chaos in the party system, and administrative processing provide adequate support for the Kansas deadline.

In Anderson, the Supreme Court found that an Ohio statute that required an independent candidate for President to file a nominating petition in March in order to appear on the general election ballot in November was unconstitutional. The Supreme Court determined that the early filing deadline placed an unconstitutional burden on the voting and associational rights of the candidate's supporters. The Court also concluded that the interests asserted by the State of Ohio in support of its early deadline--voter education, equal treatment for partisan and independent candidates, and political stability--were not tenable. While acknowledging that an informed and educated electorate was a legitimate state interest, the Court nonetheless found this important interest did not justify the specific restriction which

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in a forty-one day period between the filing deadline and the primary election. For the presidential preference primary, candidates are required to file nomination petitions by February 12. K.S.A. 25-4502(b). The presidential preference primary is held on the first Tuesday of April. K.S.A. 25-4501.

Ohio placed on independent candidates. Id. at 796. It did not believe that in today's media environment the seven-month period between the March filing deadline and the November general election was necessary to inform the voters about a candidate's qualifications and position on the issues. Id. at 796-97. The Court further observed that the filing deadline did not promote equal treatment because a Democratic or Republican presidential nominee could appear on the general election ballot even if he failed to meet the primary deadline in Ohio, but was thereafter nominated at the national convention. Id. at 799. An independent candidate would receive no such second chance. Id. As to the political stability interest, the Court noted that the Ohio deadline did not serve as either a "sore loser" or a "disaffiliation" statute, in that it did not narrow the field of candidates for the general election, and that it was not precisely drawn to protect parties from "intra-party feuding." Id. at 804-05. Under the circumstances, the Court found that the March deadline did not materially advance the state's interest in political stability. Id. at 805.

As noted in the prior order, the court is unaware of any case that has dealt with the precise issue facing this court, i.e., whether a filing deadline for independent candidates of 91 days prior to the general election is constitutional. In that order, the court summarized the present state of the law as follows:

> We know from Anderson that a filing deadline for presidential candidates of seven months prior to the general election is unconstitutional, but the Anderson court did not establish a constitutional maximum or minimum. In New Alliance Party of Alabama v. Hand, 933 F.2d 1568 (11th Cir. 1991), the Eleventh Circuit found that a deadline of April 6 for all candidates to be placed on the general election ballot in November was unconstitutional. In Populist

Party v. Herschler, 746 F.2d 656 (10th Cir. 1984) (per curiam), the Tenth Circuit determined that Wyoming's filing deadline of 45 to 90 days prior to the general election for independent candidates was constitutional.

. . . . .

At least one court, in dicta, has suggested that a filing deadline of sixty to ninety days prior to the general election would be constitutional. In Cromer v. State of South Carolina, 917 F.2d 819 (4th Cir. 1990), the Fourth Circuit determined that a filing deadline for independent candidates for state offices of 70 days prior to the primary and 200 days before the general election was unconstitutional. The court provided the following guidance for establishing a deadline that would be constitutional:

The most obvious state interest justifying any pre-election filing deadline is the need to provide a decent interval for administrative processing and for voter education. While no constitutional maximum or minimum has been developed, most states seem to have fixed on 75 to 90 days as a reasonable period to accommodate these two undoubted state interests, both as relates to primary and general elections. Looking only to those interests, a state surely could require independent candidates to declare and perfect their candidacies 60 to 90 days before a general election. Beyond that period, some other interest would seem to be needed to justify an earlier declaration of independent candidacy.

IV.

The court now turns to application of the Anderson test. We must first consider the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Anderson, 460 U.S. at 789. The filing deadline imposed by the State of Kansas, as with other election laws, is a burden upon the associational rights of independent candidates and voters. The burden is obviously not as significant as the burden imposed by the filing deadline in Anderson since the deadline here is only three months prior to general election. Moreover, the deadline does not prevent independent candidates from gaining access to the ballot. In concluding that Ohio's early filing deadline for independent candidates was unconstitutional even though the deadline was not an absolute bar to ballot access, the Anderson court found that the deadline:

> burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.

460 U.S. at 792 (footnote omitted). Also see New Alliance Party of Alabama v. Hand, 933 F.2d at 1575 ("although Alabama's early deadline does not serve to 'freeze the status quo'. . . it does make it moderately difficult for a minor party candidate to qualify to be on the ballot. . . ."). The problems noted by the court in Anderson are not nearly as significant under the deadline established by the State of Kansas. The

general election is only ninety days away and the media, as well as the voters, have begun to consider the decisions that will be shortly made. The court finds that the burden imposed by the August filing deadline is not substantial, in light of the other modest requirements of Kansas law for access to the ballot by independent candidates.

The court also recognizes, however, that the filing deadline places a restriction on the nationwide electoral process since it applies to independent candidates for president. As stated by the Court in Anderson:

> Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." Cousins v. Wigoda, 419 U.S. 477, 490 (1975). The Ohio filing deadline

> challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

460 U.S. at 794-95 (footnotes omitted).

In sum, the August 3rd filing deadline does place a burden upon the associational rights of independent candidates and voters in Kansas, albeit slight when compared to the burden imposed by the filing deadline in Anderson.

V.

The next step is to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule" and determine "the legitimacy and strength of each of those interest." Anderson, 460 U.S. at 789. The State has identified five separate interests that it seeks to further by its deadline for independent candidates: voter education, avoidance of voter confusion, political stability, prevention of fraud, and administrative processing. Each of these interests is a legitimate and compelling governmental goal. However, we must consider whether in the context of this case these interests are sufficient to uphold the filing deadline established by the State. The defendant has virtually admitted that the only one of these interests that has the strength to support the August 3rd filing deadline is voter education. The defendant has acknowledged that the other interests provide little, if any, justification for the instant filing deadline. Accordingly, the court shall focus primarily upon the interest of voter education, although we intend to briefly consider the other interests articulated by the State.

A. Voter Confusion

The Supreme Court has recognized that the state has a legitimate or compelling interest in regulating the number of candidates on the ballot so as to avoid "confusion, deception, and even frustration of the democratic process at the general election." Jenness v. Fortson, 403 U.S. 431, 442 (1971). This state interest has been sufficient to justify state laws that ensured candidates have some public support. See, e.g., Jenness, 403 U.S. at 442; American Party of Texas v. White, 415 U.S. 767, 783 (1974); Storer, 415 U.S. at 738-46 (1974). "The 'support' requirement is meant to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process." Libertarian Party of Maine v. Diamond, 992 F.2d 365, 371 (1st Cir. 1993).

The court must consider whether the filing deadline in this case furthers this state interest. It is true that the filing deadline may serve to exclude some frivolous candidates since it does preclude those candidates who decide to run at a time when compliance with the filing deadline cannot be accomplished. However, it also serves to arbitrarily exclude any individual who decides to become a candidate one day after the filing deadline, regardless of the seriousness of his candidacy or the level of community support he could demonstrate. Thus, to some degree that a filing deadline statute furthers the state interest in measuring a candidate's seriousness, it does so in an over-inclusive manner. As stated by the court in McCarthy v. Noel, 430 F.Supp. 799, 803 (D.R.I. 1976):

> The early deadline arbitrarily cuts off some candidacies in the same crude, over-inclusive manner that high filing fees did in Lubin v. Panish, supra. It suffers the same defect: it does not work. Whatever

> spurious and frivolous candidates the Rhode Island scheme has weeded out, it has also put an end to a serious, legitimate candidacy. See Lubin v. Panish, supra, 415 U.S. at 715-717, 94 S.Ct. 1315. Early filing is unreliable as a test of the genuineness of a candidacy.

In sum, we are not convinced that this interest serves to justify the filing deadline established by the State.

B. Political Stability

The next interest identified by the defendant as supporting the filing deadline for independent candidates is the state's concern for maintaining political stability. "State may properly conclude that intraparty disputes should be settled in party primaries, that the general election ballot is reserved for major political struggles, that it should not be the forum for continuing intraparty feuds and that losers in primaries should not be permitted to continue the struggle, all to the end that the general election ballot shall present the electorate with understandable choices and the winner shall sufficient support to govern effectively." Anderson v. Morris, 636 F.2d 55, 57 (4th Cir. 1980).

In Storer, the Supreme Court upheld a California statute which denied access to any independent candidate who had voted in the party primary or been registered as a member of a political party within one year prior to the immediately preceding primary. The Court determined that the statute promoted political stability since it prevented the integrity of the party primary from being compromised. The Court stated:

> The direct party primary in California is not merely an exercise or warm-up for the general election but an

> integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. Its functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

415 U.S. at 735 (footnote omitted).

The question here is whether a filing deadline furthers a state's interest in political stability by serving as a de facto disaffiliation and/or "sore loser" provision. As we determined in our prior order, we find little merit to this contention.

A review of the Kansas election scheme reveals that the filing deadline for the general election was never intended to function as a disaffiliation or sore loser statute. Kansas law contains a specific sore loser statute. See K.S.A. 25-202(c) ("[n]o candidate for any national, state, county or township office shall file for office as an independent candidate for any national, state, county or township office in the general election immediately following"). While the August filing deadline does serve as a sore loser statute in that it does prevent losers from

the primary in gaining access to the general election ballot, we do not find that the setting of this deadline was part of a legislative design as a sore loser statute since the legislature had already established such a statute. The observations of the Supreme Court in Anderson concerning the Ohio statute that established the filing deadline are applicable here:

> Section 3513.25.7 is a filing deadline, not a "sore loser" statute. It blocks access to the general election definition, no candidate has yet lost the party primary. Ohio has a separate "sore loser" statute, which is admittedly inapplicable to Anderson because he made a timely withdrawal from the Ohio Republican primary. See n. 2, supra. Furthermore, as the District Court observed, "it is clear that R.C. 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." 499 F.Supp., at 135.

460 U.S. at 804 n. 31.

In sum, we also find that this interest does not persuasively support the need for the August filing deadline.

C. Prevention of Fraud

The defendant has not explained how the filing deadline serves to prevent fraud. While prevention of fraud is of course a compelling state interest, we are not persuaded that the August filing deadline supports this concern.

D. Administrative Processing

There is little question that this interest could by itself provide sufficient justification for the filing deadline in this case.

It is obvious that the State must have adequate time to prepare election ballots. In addition, where candidates seek to gain access to the ballot through the petition process, the state needs time to investigate and verify the authenticity of the signatures and to resolve any challenges.

In this case, however, we do not find that this interest provides sufficient justification for the August filing deadline. The defendant has acknowledged that, ninety-one days is not necessary to prepare the ballots for the general election. While the defendant has attempted to provide some justification for the differences in the deadlines for the primary and general elections, the defendant has offered no evidence probative of the administrative rationale for the deadline for the general election. Accordingly, we find that this interest provides no justification for the August deadline.

E. Voter Education

The State's interest in voter education is premised upon the belief that the earlier the voters receive information about the electoral field, the better the opportunity they will have for careful selection and evaluation of the respective candidates. Although this is certainly an important concern, the question arises as to what point a filing deadline justifies this interest in light of the modern forms of communication and transportation, as well as the extensive media coverage of political campaigns.

In Anderson, the Court concluded that the state's legitimate interest in voter education did not justify the specific restriction on participation in a Presidential election that was at issue there. 460 U.S. at 797-98. The Court determined that it was "somewhat unrealistic" to suggest that in the "modern world" it takes "more than seven months to inform the electorate about the qualifications of a particular candidate

simply because he lacks a partisan label." Id. at 797.

Plaintiffs argue that the focus upon voter education by the State is misplaced. Plaintiffs point to the aforementioned statements made by the majority in Anderson suggesting that voter education occurs "largely during the month before an election." In support of this contention, they refer to certain facts which the defendant has not opposed. Dr. Sigelman has stated that research has shown that "voter decisionmaking occurs either very early in a campaign or in the last few days before the election, when media coverage is widespread and the need for information is relatively urgent."

Plaintiffs also contend that voter education does not provide a basis for differentiating between the fifty-five day deadline for the primary election and the ninety-one day deadline for the general election. In support of this contention, they refer to the following which is contained in the affidavits of Dr. Sigelman and Mr. Winger: (1) the primary voter must work harder to gain information about the primary election than the general election voter because information about primary candidates is "relatively sparse" and there is a lack of a party cue; (2) there are more candidates on the primary election ballots than the general election ballots; and (3) whether there are more choices in the general election is misleading since voters are primarily interested in the candidates for the top-of-the-ballot offices, especially in a presidential election year. Plaintiffs note that Dr. Sigelman and Mr. Winger have concluded that the State's interest in voter education requires a shorter period of time in a general election than in a primary election.

Finally, plaintiffs have also suggested that the filing deadline for independent candidates for President only marginally increases voters' knowledge since voters may be

unaware of the identities of the major party candidates in the election given the fact that the major party conventions may take place after the August 3rd filing deadline.

The court remains convinced that voter education is a sufficiently legitimate and strong interest to justify the ninety-one day filing deadline. We recognize that the State of Kansas has established a shorter deadline for the primary election, but we do not think fact requires that the same period be imposed for the general election. As we stated in our prior order:

> Despite considerable advances in technology, voters still need a reasonable time to assess the candidates, particularly independent candidates. The issues today are complex, and the ability to understand a candidate's position on a particular issue often takes time and study. While voters may not need seven months to properly assess the qualifications and positions of a candidate, we find that ninety-one days is a reasonable period.

804 F.Supp. at 1382.

The fact that research has shown that many voters educate themselves in the last month of an election does not require the State of Kansas to establish a deadline which forces voters to educate themselves in a short period of time. The State of Kansas can reasonably conclude that some, if not many, voters welcome the availability of three months to examine the candidates. The State of Kansas is not required to make a particularized showing of the need for three months of voter education in order to impose a reasonable filing deadline. Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986). As the Court stated in Munro:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96.

In his dissent in Anderson, Justice Rehnquist criticized the majority's analysis and conclusion as it related to voter education. His comments are applicable to this court's conclusions concerning the importance of voter education in the context of this case. While we recognize that Justice Rehnquist's opinion did not prevail in Anderson given the fact the Court was dealing with a seven-month filing deadline, his comments are meaningful here since we are concerned with only a ninety-one day filing deadline. Justice Rehnquist stated:

> Ohio maintains that requiring an early declaration of candidacy gives its voters a better opportunity to take a careful look at the candidates and see how they withstand the close scrutiny of a political campaign. The Court does not dispute the legitimacy of this interest. But the Court finds that "the State's important and legitimate interest in voter education

does not justify the specific restriction on participation in a Presidential election that is at issue in this case." Ante, at 796. Admitting that the Constitutional Convention in 1787, in establishing the electoral college and providing plenary authority to the States for election of its members to the college, had a heightened awareness of the importance of an informed electorate, the Court tells us how times have changed in the past 200 years and how the problem of ensuring an informed electorate is no longer so great. The Court explains: "In the modern world it is somewhat unrealistic to inform the electorate about the qualifications of a particular candidate . . . . Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues. Ante, at 797.

I cannot agree with the suggestion that the early deadline reflects a lack of "faith" in the voters. That Ohio wants to give its voters as much time as possible to gather information on the potential candidates would seem to lead to the contrary conclusion. There is nothing improper about wanting as much time as possible in which to evaluate all available information when making an important decision. Besides, the Court's assertion that it does not take 7 months to inform the electorate is difficult to explain in light of the fact that Anderson allowed himself some 19 months to complete this task; and we are all well aware that Anderson's decision to make an early go o f it is not atypical. The Court's reliance on the quote from Dunn v. Blumstein, 405 U.S., at 358, that campaign spending and voter education occur "largely during the month before an election" cannot be taken seriously when applied to

Presidential campaigns. I see no basis whatsoever for the Court's conclusion that "[t]his reasoning applies with even greater force to a Presidential election." Ante, at 798.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Buckley v. Valeo, 424 U.S., at 14-15. This is especially true in the context of candidates for President. "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." Burroughs v. United States, 290 U.S., at 545. I believe the Court of Appeals aptly explained the present day need in saying:

"To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring Presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection." 664 F.2d,

at 564.

460 U.S. 806, 818-20 (footnote omitted) (Rehnquist, J., dissenting).

The court is convinced that the State has made a legitimate and rational decision in providing a longer period of time for voters to examine candidates prior to the general election than prior to the primary election. Despite the information contained in the affidavits of Dr. Sigelman and Mr. Winger, we remain convinced that the number of choices in terms of the number of contested races coupled with the importance of the decisions justify the longer period of time. The August filing deadline serves to ensure that candidates place themselves before the public in time to allow the electorate an ample opportunity to examine the candidates' positions and qualifications.

Moreover, we do not find that fact that the major party conventions may occur after the deadline for independent candidates renders the Kansas statute unconstitutional. Plaintiffs contend that Anderson as well as two Tenth Circuit cases, Blomquist v. Thomson, 739 F.2d 525 (10th Cir. 1984) and Populist Party v. Herschler, 746 F.2d 656 (10th Cir. 1984), suggest that the filing deadline for independent candidates for President must be after the nominating conventions of the two major parties.

We do not find that these cases require that a state schedule its filing deadline for independent candidates after the major parties have selected their candidates in a presidential election year in order to be constitutional. In Anderson, the Supreme Court suggested that a filing deadline for independent candidates after the major party conventions would be helpful, but stopped short of requiring it. The Court stated:

Yet Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign--and creating new political coalitions of Ohio voters--at any time after mid to late March. At this point developments in campaigns for the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months. Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.

If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in Williams v. Rhodes, 393 U.S., at 33, "[s]ince the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election." Indeed, several important third-party candidates in American history were launched after the two major parties stakes out their positions and selected their nominees at national conventions during the summer. But under § 3513.25.7, a late-emerging Presidential candidate outside the major parties, whose positions on the issues could

> command widespread community support, is excluded from the Ohio general election ballot. The "Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." Williams v. Rhodes, supra, at 33.

460 U.S. at 790-92 (footnotes omitted).

In Blomquist and Populist Party, the Tenth Circuit did criticize Wyoming's June 1 deadline for filing petitions to form a new party. The Circuit Court, in dicta, did suggest that such a deadline "appears to run counter to views in Anderson . . . which would permit independent political parties to organize after the conventions of the major parties have chosen their tickets and platforms." Populist Party, 746 F.2d at 661. Nevertheless, the Tenth Circuit did not reach the merits of the June 1 deadline in either Blomquist or Populist Party.

The advantage of a filing date close to the general election and after the conventions of the major parties for independent candidates is that it allows the independent candidate to enter the race when issues have become crystallized. However, there is some difficulty in determining such an appropriate date in any election. As stated by one court:

> This court cannot realistically be called on to set aside the present filing deadline and thereby leave to the legislature the impossible task of ascertaining at what point in a political race the issues have become crystallized and then set the filing deadline accordingly. Carried to a logical extreme, it is conceivable that different deadlines could be required for each public office. No political race, statewide or otherwise, is identical, and at what point the issues become identified and formulated, even if capable of

> ascertainment, depends on several variables, including the nature of the office sought and the political personalities of the aspirants. The observation that the candidates themselves formulate the issues by bringing them to the focus of public attention and reaction is just as true as the converse, i.e., that the issues formulated as the campaign progresses can act as determining factors in reaching the decision to seek public office. The fact that election issues can immediately rise to the forefront of a heated political campaign and then become moot almost instantaneously indicates their nebulous nature and their potential for dissipation.

Rock v. Bryant, 459 F.Supp. 64, 74-75 (E.D.Ark. 1978), aff'd, 590 F.2d 340 (8th Cir. 1978).

Moreover, from a voter education perspective, there is obviously some advantage in requiring independent candidates to enter the race prior to the major party candidates. As stated by Justice Rehnquist in his dissent in Anderson:

> The Court ignores the fact that voters learn about a nonparty candidacy only by listening to what the candidate has to say. Reality requires a different conclusion about party candidates. Even before a party candidate is chosen, the public will know a great deal about that candidate because of its knowledge about the party. Of course, the Court is correct that the focus of a party will vary somewhat according to the candidate chosen. But this proves only that the time between the choosing of the party's nominee and the general election should be sufficient to allow the voters to evaluate the party's candidate. It does not prove that the voters need as much time

> evaluating the party candidate as they need for an individual who does not run as the representative of any particular established views. It would in fact be quite reasonable for a State to require, in furtherance of its voter education interest, that the nonparty candidate put himself before the public at an earlier time than it requires of the party candidate.

460 U.S. at 822 n. 6. See also Manifold v. Blunt, 863 F.2d 1368, 1374-75 (8th Cir. 1988) (Missouri statute requiring new political parties to certify their presidential electors earlier than established parties constitutional).

VI.

The decision in this case is a "matter of degree." While a filing deadline for independent candidates for President that precedes a general election by seven months is unconstitutional, we do not find that a filing deadline that precedes a general election by three months is unconstitutional. We reach this conclusion regardless of the particular office under consideration, i.e., President of the United States, United States Senator or United States Congressman. The court recognizes that at some point a filing deadline ceases to further legitimate state interests and operates exclusively to hinder the development of candidacies of independents. The court is also aware that a later date might also further the State's interests. Nevertheless, "the wisdom of [the law] may not color [the court's] task of constitutional adjudication." Clements, 457 U.S. at 973. The court finds that the State's interest in voter education is sufficient to justify this reasonable restriction. Accordingly, the plaintiffs' motion for summary judgment and for permanent injunction is hereby denied. The defendant's motion for summary judgment is hereby granted. The Court finds that K.S.A. 25-305 is constitutional.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment (Doc. # 27) be hereby denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment (Doc. # 24) be hereby granted. Judgment is hereby entered for the defendant and against the plaintiffs.

IT IS SO ORDERED.

Dated this 31 day of August, 1993 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to U.S. Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to a civil or criminal case, before or after rendition of judgement by decree.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

K.S.A. § 25-202(a) and (b)

Methods of nomination of candidates; limitation on filing for office; exceptions to application of article. (a) Except as otherwise provided in subsection (b) all candidates for national, state, county and township offices shall be nominated by: (1) A primary election held in accordance with article 2 of chapter 25 of the Kansas Statutes Annotated and amendments thereto; or (2) independent nomination petitions signed and filed as provided by existing statutes.

(b) Candidates for any of such offices who are members of any political party whose candidate for governor did not poll at least 5% of the total vote cast for all candidates for governor in the preceding general election shall not be entitled to nomination by primary election but shall be nominated by a delegate or mass convention according to article 3 of chapter 25 of the Kansas Statutes Annotated and amendments thereto.

K.S.A. § 25-203.

Time of holding primary. The primary national, state, county and township election shall be held on the first Tuesday of August in even-numbered years for the nomination of all candidates to be voted for at the next following general election.

K.S.A. 25-205(a).

Names of candidates printed on primary election ballots; nomination petitions, form and requirements; declarations of intent with fee; deadline for filing nomination petitions and declarations of intention to become candidate. (a) The names of candidates for national, state, county and township offices shall be printed upon the official primary ballot when each shall have qualified to become a candidate by one of the following methods and none other: (1) They shall have had filed in their behalf, not later than 12:00 noon, June 10, prior to such primary election, or if such date falls on Saturday, Sunday or a holiday, then before 12:00 noon of the next following day that is not a Saturday, Sunday or a holiday, nomination petitions, as provided for in this act; or (2) they shall have filed not later than the time for filing nomination petitions, as above provided, with the proper office a declaration of intention to become a candidate, accompanied by the fee required by law. Such declaration shall be prescribed by the secretary of state.

K.S.A. § 25-208(a), (b)

Validity of nominations; determination; duties of secretary of state and county election officers; objections. (a) Within 10 days, Saturdays, Sunday and holidays not included, from the date of the filing of nomination petitions or a declaration of intention to become a candidate for United States senator or representative or for state office, the secretary of state shall determine the validity of such petitions or declaration.

The secretary of state shall send a copy of all petitions to the county election officer of the county of the district in which the nomination petition was passed. The county election officer

shall check the petitions only for valid signatures and certify the results of such check to the secretary of state within 10 days, Saturdays, Sundays and holidays not included, of the date the petitions were filed with the secretary. The secretary of state upon receipt of the validated petition from the county election officer shall notify the candidate of the validity of the petition.

(b) Within three days from the date of the filing of nomination petitions or a declaration of intention to become a candidate for county or township office or for precinct committeeman or committeewoman, the county election officer shall determine the validity of such petitions or declaration.

K.S.A. § 25-301

Party nominations, presidential electors; governor and lieutenant governor. All nominations made by political parties shall be known and designated as "party nominations," and the certificates by which such nominations are certified shall be known and designated as "party certificates of nomination." Party nominations of candidates for public office can be made only by a delegate or mass convention, primary election or caucus of qualified voters belonging to one political party having a national or state organization. Party nominations for presidential electors can be made only by a delegate or mass convention or caucus of qualified electors belonging to a political party having a national or state organization. Party nominations for governor and lieutenant governor can be made only by a delegate or mass convention of qualified electors belonging to a political party having a national or state organization and any such political party must be one that is not permitted to nominate its candidates by primary election, and such nominations shall be made with the candidates being selected so that each convention vote shall be made for a

candidate for governor and a candidate for lieutenant governor running together. Party nominations so made shall, subject to the provisions of this act, be placed upon the official general ballot.

K.S.A. § 25-302.

Party nominations; caucus or convention by parties not authorized to participate in primary. Any recognized political party except those authorized to participate in a primary election pursuant to K.S.A. 25-202, and amendments thereto may by means of a delegate or mass convention or caucus of qualified voters belonging to such party for the state or municipality, or any lawfully organized portion of either, for which such convention or caucus is held, nominate one person for each office that is to be filled therein at the next ensuing election, and, subject to the provisions of this act, file a certificate of such nominations so made. A convention or caucus for nominatingn persons for national, state, district, or county offices shall be called by the state chairperson of the party, or if there be no state chairperson by the party's candidate for governor at the preceding general election.

Every such certificate shall be signed by the presiding officer and a secretary of the convention or caucus making such nominations. In each case the persons signing the certificates shall add to their signatures their places of residence, and shall make and subscribe an oath that, to the best of their knowledge and belief, such certificates and the statements therein made are true; and a certificate that such oath has been taken and administered shall be made and signed on such certificate of nomination by the officer before whom the same was taken.

K.S.A. § 25-303(a) and (b)

Independent nominations; section not applicable to certain elections; number of signers of petition; requirements. (a) This section shall not apply to city and school elections, nor to election of other officers provided by law to be elected in April.

(b) All nominations other than party nominations shall be independent nominations. No person who has declared and retains a party affiliation in accordance with K.S.A. 25-3301 and amendments thereto shall be eligible to accept an independent nomination for any office.

Independent nominations of candidates for any office to be filled by the voters of the state at large may be made by nomination petitions signed by not less than 5,000 qualified voters for each candidate and in the case of governor and lieutenant governor for each pair of such candidates.

K.S.A. § 25-305

Deadlines for filing certificates of nomination by convention or caucus and independent nomination petitions; deadlines for filing affidavit of write-in candidacy for offices of governor and lieutenant governor. (a) Certificates of nomination by convention or caucus for the nomination of candidates for national, state, county and township offices shall be filed with the secretary of state, or the county election officer, not later than 12:00 noon, June 10, preceding the national, state, county and township general election, except when such date falls on Saturday, Sunday or a holiday, and then not later than 12:00 noon the following day that is not a Saturday, Sunday or a holiday.

(b) Independent nomination petitions for the nomination of candidates for national, state, county and township offices shall be filed with the secretary of state or the county election officer no later than 12:00 noon on the Monday preceding the first Tuesday of August preceding a national, state, county or township general election.

(c) An affidavit of write-in candidacy for the offices of governor and lieutenant governor shall be filed with the secretary of state no later than 12:00 noon on the 2nd Monday preceding the general election for those offices.

K.S.A. § 25-308(d)

Validity of nominations; objections.

(d) In any case where objection is made, notice shall forthwith be given, by the officer with whom the objections are filed, to the other officers required to determine the matter and to the candidates affected thereby, addressed in the case of candidates to their places of residence as given in the nomination petitions, declaration of intention to become a candidate or certificate of nomination. The notice shall state the time when the objection will be considered, which shall be not more than five days following the giving of such notice in the case of nomination of a national or state officer and not more than three days following the giving of such notice in the case of nomination of a county, township, city or school officer, and the place where such objections will be considered.

K.S.A. § 25-604

Printing of ballots; establishment of rates for printing; specifications; packaging; numbers; sample ballots for educational purposes.

(a) The county election officers shall have charge of the printing of the ballots for all elections, primary, special and general. The county election officer shall let the contract for the printing of any such ballots to some newspaper printed in Kansas and published with the original entry of such newspaper within the county, or if there be no such newspaper or printer, then to some newspaper printed in Kansas of general circulation in the county at rates established by the secretary of state by rules and regulations. The director of printing and the director of accounts and reports shall advise and assist the secretary of state in preparation of the above establishment of rates. The rates shall reflect prevailing economic conditions in the printing and publishing industries in Kansas for similar work of this type and scope. The rates shall consider, but not be limited to, labor costs, printing costs, paper costs, printing quantities, changes per ballot, size and scope of election ballots, costs per additional orders, regional cost variances and other relevant factors.

(b) Nothing in this subsection shall apply to the printing of ballot labels for use on voting machines. The ballots shall be printed on paper of sufficient strength as not to be punctured by ordinary pencil making. Ballots shall be put in the possession of the county election officer at least five days before the election, accompanied by sufficient number, not to exceed 50 for each precinct or area, of exact copies of such ballots, printed on paper of any color, except white, as authorized by rules and regulations adopted by the secretary of state, for the inspection of candidates and their agents and for distribution through each of the party organizations. If any mistakes are discovered they shall be corrected without delay. County election officers may also obtain and distribute ballots on paper of any color authorized by rules and regulations adopted by the secretary of state stamped "SAMPLE BALLOT" in large letters, and these ballots shall be used for kindergarten through grade 12 school educational purposes and the distribution shall be for

such purpose. The county election officers shall cause to be delivered to the supervising judges, not less than 12 hours before the time fixed by law for the opening of the polls, a number of properly printed ballots fully sufficient to meet the demands and needs of all the voters. Such ballots shall be put in separate sealed packages of 25, 50 or 100 ballots each, with marks on the outside clearly designating the voting place for which they are intended and the number of ballots enclosed. The county election officer shall retain at the county election office an additional supply of ballots to meet any emeregency need for such ballots that might arise from loss or destruction of ballots, enlarged vote or any other legitimate cause.

K.S.A. § 25-1120

Absentee ballots and ballot envelopes; preparation; form. When the names to appear on ballots are definitely known and not later than 20 days prior to any primary, general or question submitted election each county election officer shall cause to be prepared such number of absentee ballots and ballot envelopes as in the election officer's judgment are necessary carry out the requirements of this act. Such ballots shall contain the names and cities of residence of all persons who are candidates for all national, state, county, city, township and school offices, which names may be written, typewritten or printed. On the same line with each candidate's name shall be a square in the ordinary form, or parentheses in which the voter can place a cross or check mark. In the case of elections required by law to be conducted on a partisan basis, such ballot shall indicate the political party of each candidate.

The county election officer of any county may number any such absentee ballots. If the county election officer of any county elects to prepare absentee ballots and ballot envelopes without identifying consecutive numbers, such officer shall

prepare and distribute such ballots and envelopes in accordance with a plan approved by the secretary of state. If the county election officer elects to number such ballots, all absentee ballots shall be consecutively numbered, and the ballot envelope for each ballot shall bear the same number as the ballot. The ballot envelope shall also bear a printed form of declaration in substance as follows:

"I _____ do hereby declare that I marked the enclosed ballot and that such ballot was enclosed and sealed in this envelope by me. My legal residence is in the _____ precinct, _____ township, (or, in the _____ precinct of the _____ ward, _____ street in the city of _____), in the county of _____, state of Kansas.

Signed _____"

The ballot envelope is to be used for voting by a former precinct resident shall also state the place of former residence of the voter and the date of removal therefrom to the voter's present residence.

K.S.A. 25-4501

Presidential preference primary election, when. On the first Tuesday in April of 1992, and every fourth year thereafter, there shall be held a presidential preference primary election.

K.S.A. § 25-4502(b)

Eligibility to vote; voting procedure; candidates' filing deadline; declaration and fee; petition.

(b) The name of any candidate for a political party nomination for president of the United States shall be printed on the ballots only if, not later than twelve o'clock noon, February 12 prior to the presidential preference primary or, if such date falls on Saturday, Sunday, or a holiday, not later than twelve o'clock noon the following day that is not a Saturday, Sunday or holiday:

(1) The candidate files with the secretary of state a declaration of intent to become a declaration of intent to become a candidate accompanied by a fee of one hundred dollars ($100); or

(2) there is filed in the office of secretary of state a petition in the form prescribed by K.S.A. 25-205, signed by not less than one thousand (1,000) registered electors, who are affiliated with the political party affiliation list. The secretary of state shall determine the sufficiency of each such petition, and such determination shall be final.

D. Kan. Rule 206(c)

Motions in Civil Cases

(c) **Motions for Summary Judgment**. The memorandum or brief in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.

A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a

genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of movant's fact that is disputed. All materials facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party. The statement required by this subsection shall be in addition to the material otherwise required by these rules and the Federal Rules of Civil Procedure.

All facts on which a motion or opposition is based shall be presented by affidavit, declaration under penalty of perjury, and relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions. Affidavits or declarations shall be made on personal knowledge and by a person competent to testify to the facts stated which shall be admissible in evidence. Where facts referred to in an affidavit or declaration are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document shall be attached.

Supreme Court, U.S.
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No. 94-796

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, DR. JOHN HAGELIN, JESSIE NICHOLS, PATRICIA ROBINSON, WANDA FERN KELLY,

Petitioners,

v.

BILL GRAVES, *in his official capacity as Secretary of State of Kansas,*

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 4, 1995

QUESTIONS PRESENTED

I. The Tenth Circuit decision is not in conflict with current Supreme Court decisions.

II. The filing deadline for independent nomination petitions used by the State of Kansas did not impose an unconstitutional burden on the Petitioners.

III. The Kansas filing deadline is reasonable and nondiscriminatory and, when combined with the state's important regulatory interests, justified.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

This case involves the balancing of the right of citizens to vote and the state's power to regulate elections. Petitioners, who are members of the Natural Law Party, missed the deadline set forth in K.S.A. 25-305(b) for independent candidates to file nomination petitions. K.S.A.

25-305(b) required nomination petitions for independent candidates to be filed ninety-one days prior to the general election in 1992.

The United States District Court of Kansas, by Memorandum Decision dated August 31, 1993, granted defendant/respondent Bill Graves, the Secretary of State of Kansas, summary judgment in this 42 U.S.C. § 1983 action. The Tenth Circuit Court of Appeals affirmed the decision of the District Court in a published opinion.

The facts are undisputed. The Natural Law Party (Party) was formed April 20, 1992, too late to file for recognized party status under K.S.A. 25-302(a) that year. In late June 1992, the Party began efforts to obtain the necessary nominating petitions. On August 3, 1992, the K.S.A. 25-305(b) filing deadline for independent candidates, the Party's candidates submitted petitions containing less than the 5000 signatures required for filing. The Secretary of State rejected the petitions for insufficient signatures. On August 14, 1992, eleven days past the filing deadline, the Party filed additional nomination petitions. The Secretary of State rejected these untimely petitions.

Kansas does not impose a specific deadline for the filing of Republican and Democratic nominations for President. K.S.A. 25-301. In 1992, the Republican party nominated its' candidate on August 19th. The Party had submitted their untimely petitions with sufficient numbers on August 14, 1992 and were rejected. Therefore, in 1992, independent candidates were required to file nominating petitions before the Republican presidential nominee was known.

The Party contends that Kansas' ballot access laws unfairly discriminate against independent candidates by imposing a filing deadline for independent candidates ninety-one days before the general election, while the Republican and Democratic parties can place their presidential candidates on the ballot after such candidates are designated. The Party argues that the filing requirements violate their First and Fourteenth Amendment speech, voting and associational rights.

Respondent contends that the burden imposed upon the Party's 1st and 14th Amendments rights by K.S.A. 25-305(b) is slight and that the state's interests, including voter education, are sufficient to justify the nomination petition filing deadline.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE TENTH CIRCUIT DECISION IS NOT IN CONFLICT WITH CURRENT SUPREME COURT DECISIONS.

The Party contends that the Tenth Circuit Court of Appeals decided the federal question of ballot access in this case by applying a standard seemingly in conflict with the decision of the Eighth Circuit Court of Appeals. The Tenth Circuit applied the reasoning used in *Anderson v. Celebrezze*, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983). The standard set forth in *Anderson* is a balancing test wherein:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the right protected by the

> First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Burdick v. Takushi, 504 U.S. _____, 119 L. Ed. 2d 245, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson*); *See Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988); *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986).

The Eighth Circuit applied strict scrutiny for purposes of equal protection challenges to ballot access restrictions. *Manifold v. Blunt*, 863 F.2d 1368, 1372 (1988), *cert denied*, 493 U.S. 893, 107 L. Ed. 2d 192, 110 S. Ct. 242 (1989). This standard requires that the restrictions must be necessary to serve a compelling state interest, and may not go beyond what the state's interest actually requires.

The Party would have the Court decide the proper standard to be applied to an equal protection challenge. The Court has held that when addressing a First Amendment challenge to a state election law, the balancing test in *Anderson* applies.

The Court has decided the proper standard that applies to ballot access restrictions. In *Burdick*, 112 S.Ct. at 2063, the Court held that strict scrutiny is not appropriate in every voting regulation case.

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifi-

> cations of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree— the individual's right to vote and his right to associate with others for political ends.' *Anderson* at 1569-1570. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system 'creates barriers. . . tending to limit the field of candidates from which voters might choose. . . does not of itself compel close scrutiny.'

Bullock v. Carter, 405 U.S. 134, 143, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972); *Anderson*, 103 S. Ct. at 1569-1570; *McDonald v. Board of Election Comm'nrs of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969).

The full Court in *Anderson* agreed that a standard which is more flexible than a strict scrutiny standard applies to ballot access cases. This standard is the balancing approach that has been used in the two most recent ballot access cases this Court has decided. *Burdick v Takushi*, 112 S. Ct. 2059 (1992), and *Norman v. Reed*, 502 U.S. ——, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992). Both of these cases applied *Anderson*. Both of these cases were decided *after* the Eighth Circuit decided the case upon which Petitioners rely, *Manifold v. Blunt*, 863 F.2d 1368 (1988). The Tenth Circuit's use of the *Anderson* standard in deciding

the Party ballot access case is consistent with the most current ballot access cases decided by this Court.

II. THE FILING DEADLINE FOR INDEPENDENT NOMINATION PETITIONS USED BY THE STATE OF KANSAS DID NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON THE PETITIONERS.

The Party also contends that, even if the *Anderson* standard was appropriate, the Tenth Circuit decided this case contrary to *Anderson*. This is incorrect.

While recognizing that independent candidates would be best served by filing deadlines which fall after the major party conventions, the *Anderson* court did not hold that such a law was constitutionally mandated. Instead, it warned the States that they should not enact filing deadlines which fall unnecessarily far in advance of the primary and general election. Unlike *Anderson*, which involved a substantial advance deadline, this case involves a very innocuous filing deadline of 91 days prior to the general election.

The language in *Anderson* stops short of requiring states to enact filing deadlines which fall after the conventions of the major parties. In fact, the Court only goes so far as to state:

> If the states' filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a group of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams v. Rhodes*, 393 U.S. at 33, 89 S.Ct. at 11, '{s}ince the principal

> policies of the major parties change to some extent from year to year and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected' group will rarely, if ever, be a cohesive or identifiable group until a few months before the election.

Anderson, 103 S. Ct. at 1571.

In *Blomquist v. Thomson*, 739 F.2d 525, 528 (10th Cir. 1984), the Tenth Circuit held that a June 1 deadline for a new political party seeking ballot access is a direct burden on voting rights because it "prevents a new party from seeking support at a time when such support is most likely to crystallize— after the established political parties have put forth their candidates and platforms." (citing *Anderson*, 460 U.S. at 790-91); *Rainbow Coalition*, 844 F.2d at 744 (May 31 deadline).

However, in *Rainbow Coalition*, 844 F.2d at 745-46, the Tenth Circuit did not give significant weight to undisputed evidence that minority parties have difficulty with petition drives until after the major parties' conventions, in light of the Supreme Court's approval of filing deadlines before the major party conventions in previous cases. *American Party v. White*, 415 U.S. 767, 787 n.18, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) and *Jenness v. Fortson*, 403 U.S. 431, 438, 29 L. Ed. 2d 554, 91 S. Ct. 1970 (1971).

Using *Anderson* as a guide, the Tenth Circuit concluded that the filing deadline for independent candidates in this case which fell a few weeks before one major party's convention one year did not impose a substantial burden on voting rights. The deadlines in previous Tenth Circuit cases

and *Anderson* fell before the major parties held their conventions as well. Consequently, the present case was decided in line with *Anderson*.

The Tenth Circuit also concluded that the open-ended deadline for the major parties in this case does not discriminate against the independent candidate. The Tenth Circuit reasoned that because K.S.A. 25-4502(b) requires that major party nominees must file a declaration of intent or qualifying petition by February 12 to run in the presidential preference primary, and then survive the primary and national convention, major party nominees also have hurdles to cross just as the independent nominees have.

While independent nominees face different burdens, they are not more onerous than the burdens major party candidates face. Arguably, independent candidates face a lighter burden because a nonparty candidate need only obtain the necessary number of signatures and file a petition in early August for his or her name to appear on the ballot. Independent candidates do not have to win a primary race or face the same public scrutiny that major party candidates face in order to be placed on the ballot.

The Kansas filing deadline did not impose an unconstitutional burden on independent candidates.

III. THE KANSAS FILING DEADLINE IS REASONABLE AND NONDISCRIMINATORY AND, WHEN COMBINED WITH THE STATE'S IMPORTANT REGULATORY INTERESTS, JUSTIFIED.

The Tenth Circuit after viewing Kansas' election scheme in its entirety, concluded that the independent filing

deadline is a reasonable response to the state's interest in voter education. See *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985). Presidential candidates who run in the presidential preference primary must file their nominating papers almost six months in advance of independent candidates. Independent candidates have until August to file. The six month excess time period for major party candidates serves to educate the public as to their viability as the party's candidate.

It is reasonable for Kansas to require, in the interest of voter education, that independents make their candidacies official around the same time the major party candidates are made known to the public. After the primary and the independents file, the candidates can then begin debating the issues and subject themselves to public scrutiny. Because the exact dates of the major party conventions are not known from year to year, but the approximate time frame is (the summer months), it is reasonable for Kansas to choose a filing date for independent candidates that is around the time all of the candidates will be known. See *Anderson*, 460 U.S. at 800.

The Kansas filing deadline is reasonable and nondiscriminatory. The state's interest in voter education justifies the slight burden K.S.A. 25-305(b) imposes on plaintiff's rights.

CONCLUSION

The Respondent respectfully submits that the Writ of Certiorari prayed for in this action be denied for the following reasons: (1) The Tenth Circuit decision is not in conflict with current Supreme Court decisions; (2) The filing

deadline for independent nomination petitions used by the State of Kansas did not impose an unconstitutional burden on the Petitioners; (3) The Kansas filing deadline is reasonable and nondiscriminatory and, when combined with the state's important regulatory interests, justified.

Respectfully submitted,

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